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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 DMITRIY V. NOVIKOV,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of  
15 Social Security,

16 Defendant.

CASE NO. C07-5415BHS-KLS

REPORT AND  
RECOMMENDATION

Noted for August 22, 2008

17 Plaintiff, Dmitriy V. Novikov, has brought this matter for judicial review of the denial of his  
18 applications for disability insurance and supplemental security income (“SSI”) benefits. This matter has  
19 been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule  
20 MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After  
21 reviewing the parties’ briefs and the remaining record, the undersigned submits the following Report and  
22 Recommendation for the Honorable Benjamin H. Settle’s review.

23 FACTUAL AND PROCEDURAL HISTORY

24 Plaintiff currently is 60 years old.<sup>1</sup> Tr. 40. He completed high school in Russia and has past work  
25 experience as a potato sorter or packing line worker. Tr. 24, 67, 86, 328.

26 On September 13, 2004, plaintiff filed applications for disability insurance and SSI benefits,  
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28 <sup>1</sup>Plaintiff’s date of birth has been redacted in accordance with the General Order of the Court regarding Public Access to  
Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 alleging disability as of October 31, 2002, due to type II diabetes, high blood pressure, hemorrhoids,  
2 obesity, arthritis in both legs, and heart problems. Tr. 62-63, 66, 242-45. His applications were denied  
3 initially and on reconsideration. Tr. 40-42, 47, 246-48, 252. A hearing was held before an administrative  
4 law judge (“ALJ”) on December 27, 2006, at which plaintiff, unrepresented by counsel, appeared and  
5 testified, as did two lay witnesses. Tr. 323-41.

6 On March 9, 2007, the ALJ issued a decision, determining plaintiff to be not disabled, finding  
7 specifically in relevant part:

- 8 (1) at step one of the sequential disability evaluation process,<sup>2</sup> plaintiff had not  
9 engaged in substantial gainful activity since his alleged onset date of disability;
- 10 (2) at step two, plaintiff had a “severe” impairment consisting of diabetes mellitus,  
11 type II;
- 12 (3) at step three, none of plaintiff’s impairments met or equaled the criteria of any  
13 of those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1; and
- 14 (4) at step four, plaintiff had the residual functional capacity to perform light work,  
15 with additional postural limitations, which did not preclude him from  
16 performing his past relevant work.

17 Tr. 13-25. Plaintiff’s request for review was denied by the Appeals Council on June 18, 2007, making the  
18 ALJ’s decision the Commissioner’s final decision. Tr. 6; 20 C.F.R. § 404.981, § 416.1481.

19 On August 10, 2007 plaintiff filed a complaint in this Court seeking review of the ALJ’s decision.  
20 (Dkt. #1-#3, #5). The administrative record was filed with the Court on November 27, 2007. (Dkt. #12).  
21 Plaintiff argues the ALJ’s decision should be reversed and remanded to the Commissioner for an award of  
22 benefits or, in the alternative, for further administrative proceedings for the following reasons:

- 23 (a) the ALJ erred by failing to ensure plaintiff a fair hearing;
- 24 (b) the ALJ erred in assessing plaintiff’s residual functional capacity;
- 25 (c) the ALJ erred in evaluating the lay witness evidence in the record; and
- 26 (d) the ALJ should have found him disabled at step five of the sequential disability  
27 evaluation process.

28 The undersigned agrees the ALJ erred in determining plaintiff to be not disabled, but, for the reasons set  
forth below, recommends that while the ALJ’s decision should be reversed, this matter should be

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<sup>2</sup>The Commissioner employs a five-step “sequential evaluation process” to determine whether a claimant is disabled. See  
20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step, the disability  
determination is made at that step, and the sequential evaluation process ends. Id.

1 remanded to the Commissioner for further administrative proceedings.

## 2 DISCUSSION

3 This Court must uphold the Commissioner's determination that plaintiff is not disabled if the  
4 Commissioner applied the proper legal standard and there is substantial evidence in the record as a whole  
5 to support the decision. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is  
6 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson  
7 v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than  
8 a scintilla but less than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir.  
9 1975); Carr v. Sullivan, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than  
10 one rational interpretation, the Court must uphold the Commissioner's decision. Allen v. Heckler, 749  
11 F.2d 577, 579 (9th Cir. 1984).

### 12 I. The ALJ Erred in Failing to Fully and Fairly Develop the Record

13 The ALJ has the duty "to fully and fairly develop the record and to assure that the claimant's  
14 interests are considered." Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001) (citations omitted).  
15 When a claimant is unrepresented, furthermore, "the ALJ must be especially diligent in exploring for all  
16 the relevant facts." Id. As noted above, at the administrative hearing in this case, plaintiff appeared and  
17 testified without counsel. Plaintiff argues that because it is clear from the hearing transcript he was not  
18 fluent in English, because his answers generally were incomprehensible and because it was uncertain he  
19 understood the questions posed to him, the ALJ should have required the aide of the translator who was  
20 present at the meeting to ensure creation of a good record. The undersigned agrees.

21 At the beginning of the hearing, an exchange took place between the ALJ and plaintiff, which reads  
22 in relevant part:

23 ALJ: . . . We have present today to provide the services of a translator, interpreter,  
24 Ms. Anzaila -- . . .

25 ALJ: -- Genserick. . . .

26 ALJ: . . . Mr. Novikov, . . . You were notified in your Notice of Hearing that you  
27 had a right to be represented by an attorney or other individual of your  
choice. Did you look into trying to find a lawyer?

28 CLMT: No.

ALJ: You speak English?

1 CLMT: Yes.

2 ALJ: Okay. Then why do we have an interpreter?

3 CLMT: My wife doesn't speak.

4 ALJ: Okay.

5 CLMT: And sometimes I get broken in my speech.

6 ALJ: Okay.

7 CLMT: I don't know some special words.

8 ALJ: All right. I suggest that you and I proceed in English. And if you have any  
9 difficulty we'll ask the interpreter.

10 CLMT: Uh-huh. Sure. . . .

11 . . .

12 CLMT: -- if I don't know what, I'll tell my wife and it's --

13 ALJ: Okay. Well, then we'll just have her interpret everything. Okay.

14 CLMT: Have her to do everything. . . .

15 . . .

16 INT: The interpreter wants to ask. Did you say then I have to interpret everything?

17 ALJ: Yes. Just for the benefit of the spouse. . . .

18 Tr. 325-26. Defendant argues this shows the plaintiff requested the interpreter mostly for the benefit of his  
19 wife, and that, in response, the ALJ asked the interpreter to "interpret everything." Thus, defendant  
20 asserts, the interpreter fully participated in the hearing, thereby defeating plaintiff's claim here.

21 Although this is what the ALJ stated was going to happen, an examination of the hearing transcript  
22 indicates, as pointed out by plaintiff, that this did not in fact occur. There are, as plaintiff notes, a number  
23 of times where plaintiff's responses to the ALJ's questions did not make a lot of sense, and which the ALJ  
24 himself indicated he was having trouble understanding. Take the following exchange, for example, which  
25 reads in relevant part:

26 Q Well what brought you to Seattle? . . .

27 . . .

28 A I, I had some temporary work and, and the, the diabetes stopped me. And I'm,  
I'm -- and that I'm alleging. And that I, but it was wasn't really begin steady.  
I, I was still to be able to work on some duty. But when arthritis got me, I, I

1 stopped heavy duty. And since that time I don't work. I don't work for the last  
2 three years, up through -- yeah. I was at my last job --

3 Q I'm sorry. And what about the last job in --

4 A -- in Pendia.

5 Q Sir, I asked you --

6 A I try to see, it's the stuff that's a little diregious (phonetic)?

7 Q I little?

8 A I don't want to -- is there a special -- is there --

9 Q Well, go ahead. I thought there was --

10 A Yeah. . . .

11 Tr. 327-28. In another example, in response to whether he was on a diabetic diet, plaintiff responded:

12 Yeah. I try. But when, when I, I try to tell the truth, then my income was fair. I could,  
13 I could hold my diet. Now, it's more difficult for me as much.

14 Tr. 329. When asked if he had any reports from his physician, plaintiff stated:

15 Yeah. I, I -- as I told you, I, I've got to subjects for my, my -- and just five days ago I  
16 got subject on my throat. It was sleep apnea. I'm still, I'm still under strong pain  
17 killers which --

18 Tr. 330. The ALJ later inquired if surgeries plaintiff had undergone were performed at Tacoma General  
19 Hospital, to which plaintiff responded:

20 No. Surgery at Pen yak. At that one. And surgery for the apnea at the agency at the  
21 University. The University. The University at 45 Street, in Tamaqua, and you and  
22 Boss Street.

23 Tr. 331.

24 The hearing transcript contains many further examples. For instance, in response to the question as  
25 to where he had arthritis, plaintiff stated:

26 As, as soon as I get digious (phonetic) I, I talk to you. I, I am made next year that has  
27 struck me, it's -- it happens in April, 2002.

28 Tr. 332. The hearing transcript also contains the following exchange:

Q Okay. How do you spend your time? What do you do all day?

A Oh, if, if I feel myself let down, I, I console him for finding it.

Q You do what?

A Go for something to the store for, for some kind of food, for finding it. And to

1 follow what I have to say with doctor. So I get a lot of, lot of juice and things.

2 Q Your daughters live with you?

3 A One of them lives with me and another one in the hospital. We, we are taking  
4 from home for 30 days, and to send her back to hospital again for 30 days with  
that then.

5 Q And what, what is involved in caring for the daughter who lives with you?

6 A Just so supposed to we need, we need to be guard because of mental illness. If,  
7 if you're awake and doing anything. They, they can, they can make a lot of  
damage.

8 Q A lot of what?

9 A Damage, post, feels, or, or do something extra mouth for -- everything.

10 Q Do you do any --

11 A If there is a -- it's rare like me as kind of. We doing afraid now.

12 Q I, I don't understand what you're saying?

13 A The daughters are afraid of me, so I have to guard them more and care about  
14 them more. When mother, for example, where sometime is mother, is, is where,  
where sometimes afraid for them. I can, I, I -- as a result I can vouch for it.

15 Q You, you can do what with them?

16 INT: Guard them, watch them.

17 ALJ: Guard them. Yeah.

18 Tr. 333-34. As a final example, the ALJ asked plaintiff if he did anything for exercise, to which plaintiff  
19 responded:

20 No, I stopped to do any exercise after psychiatrist told me. I did them before. I, I fold  
21 my game. And it's, it's -- I tried to stroke then. I stuck to this because I got a lot of  
pain in my for it's --

22 Tr. 335.

23 It is difficult to believe plaintiff's testimony was translated by the interpreter, for, as can be seen  
24 above, much of it consists of broken English which is difficult to decipher to say the least. Rather, what  
25 most likely occurred here was that the interpreter translated the ALJ's questions and comments for the  
26 benefit of plaintiff's wife, but not the testimony of plaintiff himself. This is further evidenced by the fact  
27 that the interpreter jumped in at the end of plaintiff's testimony regarding his daughters as set forth above,  
28 and by the fact that the testimony of plaintiff's wife was much more easily understood, indicating that her

1 testimony, unlike plaintiff's, was translated by the interpreter. See Tr. 341. Clearly, the interpreter would  
2 not have had to do jump in and translate plaintiff's testimony that he had to guard or watch his daughters if  
3 she had been translating plaintiff's testimony all along.

4 To the extent the interpreter actually had been translating plaintiff's testimony, furthermore, that  
5 translation the undersigned finds to be unacceptably defective, as much of what plaintiff said cannot be  
6 understood. Indeed, the ALJ himself appeared to have just as much difficulty doing so. Accordingly, the  
7 hearing transcript indicates plaintiff was unable to adequately make himself understood, and, as such, the  
8 record as a whole cannot be said to be complete. Other evidence in record, although mixed, gives at least  
9 some indication as well that plaintiff had less than a complete ability to communicate effectively in  
10 English with his medical sources (see Tr. 192, 195, 198, 203), which further calls into question his ability  
11 to make himself understood at the hearing. Remand to the Commissioner is needed, therefore, for a new  
12 hearing at which an interpreter should be provided to translate plaintiff's testimony.

## 13 II. The ALJ's Assessment of Plaintiff's Residual Functional Capacity

14 If a disability determination "cannot be made on the basis of medical factors alone at step three of  
15 the evaluation process," the ALJ must identify the claimant's "functional limitations and restrictions" and  
16 assess his or her "remaining capacities for work-related activities." SSR 96-8p, 1996 WL 374184 \*2. A  
17 claimant's residual functional capacity assessment is used at step four to determine whether he or she can  
18 do his or her past relevant work, and at step five to determine whether he or she can do other work. Id. It  
19 thus is what the claimant "can still do despite his or her limitations." Id.

20 A claimant's residual functional capacity is the maximum amount of work the claimant is able to  
21 perform based on all of the relevant evidence in the record. Id. However, a claimant's inability to work  
22 must result from his or her "physical or mental impairment(s)." Id. Thus, the ALJ must consider only  
23 those limitations and restrictions "attributable to medically determinable impairments." Id. In assessing a  
24 claimant's residual functional capacity, the ALJ also is required to discuss why the claimant's "symptom-  
25 related functional limitations and restrictions can or cannot reasonably be accepted as consistent with the  
26 medical or other evidence." Id. at \*7.

27 In this case, the ALJ assessed plaintiff with the residual functional capacity "to perform light work  
28 with additional postural limitations." Tr. 20. In regard to the latter, the ALJ found plaintiff had "postural  
restrictions due to occasional dizziness including not climbing ladders, scaffolds and ropes, no work at

1 unprotected heights, and only occasional climbing of ramps and stairs.” Tr. 21. Plaintiff argues the ALJ  
2 erred here, asserting that the medical evidence and testimony in the record indicates he does not have the  
3 residual functional capacity to perform even sedentary work. Specifically, plaintiff asserts in relevant part:

4 . . . The record supports the fact that Mr. Novikov could not possibly perform anything  
5 less than sedentary work . . . Both of his feet are numb, he has chronic left sided pain  
6 in his leg, knee and foot, and lower back, he has anxiety, he has shortness of breath  
with almost any activity, he has significantly disturb [sic] sleep requiring him to take  
naps during the day. . . .

7 The record supports the fact that Mr. Novikov’s diabetes is uncontrolled by  
8 medication. He states that his diabetes, sleep apnea, and arthritis in the extremities  
9 and lower back are the most constantly bothersome impairments. It was these  
10 impairments that caused him to finally quit as a potato sorter in 2002. Now this  
11 condition has worsened. Mr. Novikov had subjective complaints of fatigue, shortness  
of breath and drowsiness, left sided pain in the knee, left leg and numb feet. . . . His  
sleep apnea disrupted his sleep throughout the night which meant that he napped for  
one hour daily . . . His pain in his lower back and arthritis in all extremities, shortness  
of breath, fatigue, [and] anxiety contribute to his inability to maintain the persistence  
and pace necessary for substantial gainful activity.

12 (Dkt. #15, pp. 10-11).

13 Plaintiff, however, both overstates the medical evidence in the record regarding his impairments  
14 and symptoms, and fails to show his impairments and symptoms have resulted in work-related limitations  
15 greater than those found by the ALJ. First, much of the evidence plaintiff points to is based on his own  
16 subjective complaints. The ALJ, though, determined plaintiff to be not fully credible concerning those  
17 complaints and their affect on his ability to work (Tr. 21-22), and plaintiff has not specifically challenged  
18 that determination. In addition, the medical evidence in the record simply does not support a finding that  
19 plaintiff is unable to do even less than sedentary work as argued by him. Of the three physicians in the  
20 record who opined as to plaintiff’s residual functional capacity, for example, two found plaintiff to be  
21 capable of essentially light work (see Tr. 149-56, 203), and the third found he could perform sedentary  
22 work (see Tr. 158). The ALJ, furthermore, provided adequate reasons for discounting the latter physician’s  
23 opinion, which finding, again, plaintiff does not specifically challenge:

24 I considered a DSHS physical evaluation completed in February 2003 by Mohammed  
25 Osman, M.D., in February 2003 [sic] . . . In the . . . evaluation, he listed the claimant’s  
26 diagnoses as type II diabetes, hypertension, arthritis, obesity and hemorrhoids, and  
checked a box indicating the claimant was capable of sedentary work. In support of the  
27 claimant’s limitations, he noted decreased range of motion on forward bending . . . Dr.  
Osman’s opinion is not persuasive. As noted, there is no indication that he was a  
treating physician of the claimant. Further, he provides no narrative explanation for his  
28 limitation to sedentary work and the only objective finding was decreased range of  
motion on forward bending. Without more, such a restrictive limitation to sedentary  
work is not warranted. There is no other opinion of record supporting sedentary work.



1 Dr. Osman's conclusory opinion is therefore afforded little weight in the residual  
2 functional capacity determination.

3 Tr. 23; see . Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1195 (9th Cir.  
4 2004) (ALJ need not accept opinion of physician if it is brief, conclusory, and inadequately supported by  
5 clinical findings or by record as whole); see also Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002);  
6 Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001).

7 As to plaintiff's complaints of pain in his back and left leg, knee and foot, the medical evidence in  
8 the record fails to support limitations more severe than those found by the ALJ. While plaintiff had some  
9 complaints of left heel and knee pain in early November 2002, physical examination findings at the time  
10 were largely unremarkable. Tr. 179-80. In mid-December 2002, plaintiff was limited only to no heavy  
11 lifting due in part to his knee pain. Tr. 300. In early December 2004, furthermore, plaintiff had only "trace  
12 edema" in his feet and ankles, had no effusion, and minimal to moderate laxity and no tenderness in his  
13 left knee, and showed little or no deficits with respect to his coordination, station, gait, and motor strength.  
14 Tr. 201. No medical source in the record other than that from Dr. Osman – which the ALJ properly  
15 rejected as discussed above – limited plaintiff to less than light work activity because of plaintiff's pain or,  
16 as noted by the ALJ, or for any of his other symptoms.

17 With respect to plaintiff's alleged arthritis, the medical evidence in the record, in addition to failing  
18 to reveal more significant work-related limitations in his back and lower left extremity, also does not show  
19 plaintiff had problems with his upper extremities. For example, in early December 2004, examination of  
20 plaintiff's hands revealed a lack of any tremor or muscle wasting, and he "was able to close his fingers into  
21 a complete fist and extend them fully." Tr. 201. Grip and upper extremity strength was full as well. Id. In  
22 late June 2006, plaintiff was found to exhibit no muscular or joint pain, weakness, stiffness, swelling, or  
23 inflammation in any of his extremities. Tr. 306. No medical source in the record has opined that plaintiff has  
24 any manipulative limitations due to arthritis or any other physical impairment. See Tr. 152, 203.

25 Plaintiff's allegations that he has significant limitations due to sleep apnea, shortness of breath and  
26 significantly disturbed sleep are also without support in the medical evidence in the record. Although the  
27 record shows plaintiff has probable sleep apnea (see Tr. 170, 215, 237), no medical source has noted any  
28 specific work-related limitations as a result thereof. Plaintiff reported in late May 2003, that he was  
having trouble getting enough air (Tr. 169), but no work-related limitations were noted. In early

1 December 2004, it was reported that plaintiff had at most only “mild difficulty breathing” due in part to his  
2 sleep apnea. Tr. 200, 202. Problems with shortness of breath again were in early April 2005, but, once  
3 more, there was no indication of any specific work-related limitations. Tr. 279. Indeed, in late June 2006,  
4 plaintiff reported being “able to walk five blocks and two flights of stairs without any difficulty, and he  
5 denied “having any shortness of breath.” Tr. 305.

6 In regard to plaintiff’s claim that his diabetes is uncontrolled by medication, the evidence, although  
7 somewhat mixed, largely indicates otherwise. Thus, for example, his diabetes was found to be controlled  
8 in mid-October 2002. Tr. 182. In early November 2002, plaintiff himself reported that his blood sugar was  
9 “well controlled.” Tr. 179. Plaintiff’s diabetes was still found to be controlled in early March 2003,  
10 despite his report at the time that he did not follow a diabetic diet “for the last month,” had “gained some  
11 weight” and “did not exercise regularly.” Tr. 174. While plaintiff was diagnosed with diabetes in early  
12 December 2004, no work-related limitations were specifically noted to have resulted therefrom by the  
13 examining physician. Tr. 202. Although plaintiff’s diabetes was noted to be “poorly controlled” in late  
14 May 2006 (Tr. 277), in late June 2006, it was noted to be “managed . . . on oral medications” (Tr. 232).

15 As to the allegations of numb feet, plaintiff did report having experienced numbness in his feet in  
16 late May 2003. Tr. 169. However, he further reported that the numbness went away after a few days. Id.  
17 The physical examinations in the record, furthermore, fail to reveal much, if any, in the way of objective  
18 medical evidence of such numbness. See, e.g., Tr. 306, 316. Indeed, in early December 2004, sensation  
19 specifically was noted to be intact in both plaintiff’s hands and his feet. Tr. 201. Nor, as revealed by the  
20 discussion herein, does the objective medical evidence in the record show there to have been a worsening  
21 of plaintiff’s condition as he has claimed, or that his fatigue has resulted in an inability to do even less than  
22 sedentary work. See Tr. 172-73.

23 Lastly, with respect to plaintiff’s claim that his anxiety has contributed to his inability to maintain  
24 the persistence and pace necessary for substantial gainful activity, again, the objective medical evidence in  
25 the record simply does not support this. In early December 2004, plaintiff “categorically denied” having  
26 any psychiatric symptoms or problems, and stated that he did not really understand why he was having to  
27 undergo a psychiatric evaluation. Tr. 192-93. No problems with persistence or pace were noted at the  
28 time, and the evaluator did not see plaintiff’s anxiety symptoms significantly interfering with his ability to

1 work. Tr. 195-96. Plaintiff was diagnosed with moderate anxiety by another physician in early December  
2 2004, as well, but again no limitations on persistence or pace were opined. Tr. 202-03. At most, only  
3 moderate limitations in those areas or supported by the record. See Tr. 141, 145-47.

4 Accordingly, the undersigned finds the above-stated reasons put forth by plaintiff for asserting that  
5 the ALJ erred in assessing his residual functional capacity to be without merit. Nevertheless, because this  
6 matter is being remanded to obtain further testimony from plaintiff at a new hearing, and, as discussed in  
7 further detail below, to re-evaluate the lay witness evidence in the record, if on remand, such testimony  
8 and evidence calls into question the ALJ's assessment of plaintiff's residual functional capacity, that issue  
9 shall be re-considered by the Commissioner as well. If, in turn, that assessment of plaintiff's residual  
10 functional capacity is found to be erroneous, then the Commissioner shall re-consider the ALJ's  
11 determination at step four, and if necessary proceed on to step five, of the sequential disability evaluation  
12 process.

### 13 III. The ALJ's Evaluation of the Lay Witness Evidence in the Record

14 Lay testimony regarding a claimant's symptoms "is competent evidence that an ALJ must take into  
15 account," unless the ALJ "expressly determines to disregard such testimony and gives reasons germane to  
16 each witness for doing so." Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001). An ALJ may discount lay  
17 testimony if it conflicts with the medical evidence. Id.; Vincent v. Heckler, 739 F.2d 1393, 1395 (9th Cir.  
18 1984) (proper for ALJ to discount lay testimony that conflicts with available medical evidence). In  
19 rejecting lay testimony, the ALJ need not cite the specific record as long as "arguably germane reasons"  
20 for dismissing the testimony are noted, even though the ALJ does "not clearly link his determination to  
21 those reasons," and substantial evidence supports the ALJ's decision. Lewis, 236 F.3d at 512. The ALJ  
22 also may "draw inferences logically flowing from the evidence." Sample, 694 F.2d at 642.

23 In addition to plaintiff's wife, plaintiff's son also appeared and testified at the hearing. See Tr. 337-  
24 39. Plaintiff argues the ALJ did not want to ask any questions of plaintiff's son. However, this is not true,  
25 as the ALJ clearly did pose questions to him regarding plaintiff's ability to return to work and differences  
26 he saw in plaintiff's daily behavior. See id. While plaintiff does recognize the ALJ did ask plaintiff's son  
27 at least some questions at the end of the hearing, he asserts the ALJ erred in not giving any weight to his  
28 son's testimony that his health started to decline five years ago, that he could not continue to work on a

1 consistent basis despite his strong work ethic, and that he complained constantly about his aches and pains.

2 See id. The undersigned disagrees.

3 The ALJ gave the following reasons for discounting the testimony of plaintiff's son:

4 I have also considered the lay testimony of the claimant's son that his father cannot  
5 work; however, it is not supported by the thorough examination of the claimant's  
6 medical records and activities of daily living discussed above. Again, there are  
7 doubtless motivational issues to provide support to add claimant to the financial  
8 support rolls of the government. It is appropriate in this regard to consider the  
motivation and relationship of the witnesses and the consistency or compatibility of  
nonmedical testimony with objective medical evidence. . . . It is not inappropriate to  
discount testimony of witness if it is motivated by a desire to see claimant obtain  
benefits. . . .

9 Tr. 24. As discussed above, the objective medical evidence in the record does not support a finding that  
10 plaintiff is unable to perform even less than sedentary work. As such, the ALJ did not err in discounting  
11 the testimony of plaintiff's son that plaintiff is unable to work. In addition, earlier in his decision, the ALJ  
12 made the following findings regarding plaintiff's activities:

13 The claimant's reported activities . . . do not support his allegations of severe functional  
14 limitations. For example, despite his contention that he cannot work and can only walk  
15 and stand for 15 minutes, the claimant reported . . . that he performed household chores  
16 including cutting the grass, grocery shopping, and taking family members to  
appointments and that he and his wife were active in their church and attended services  
three to four times per week . . .

17 Tr. 22. This is another germane reason for rejecting the testimony of plaintiff's son.

18 While the evidence in the record does indicate some motivational and/or secondary gain issues that  
19 call plaintiff's own credibility into question (see Tr. 22, 336), nothing in the record clearly shows  
20 plaintiff's son was motivated by the same financial considerations. Indeed, plaintiff's son testified that  
21 because of the close-knit nature of Russian families, he would watch and see if he could help his father,  
22 even though he would be starting his own family. Tr. 338. This hardly evinces a desire to add plaintiff to  
23 the support rolls of the government.<sup>3</sup> Nevertheless, while the undersigned does not find this to be a  
24 germane reason for not giving weight to the testimony of plaintiff's son, as discussed above, the ALJ did  
25 provide two other valid reasons for rejecting it.

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26 <sup>3</sup>The undersigned notes defendant's citation to Greger v. Barnhart, 464 F.3d 968 (9th Cir. 2006), in which the Ninth Circuit  
27 upheld the ALJ's decision to discount lay witness evidence in that case in part because that witness had a "close relationship" with  
28 the claimant and "was possibly 'influenced by her desire to help [him],'" which were found to be "germane" to her. Id. at 972.  
While the Court of Appeals' language in Greger cannot be disputed, again it is noted that no actual evidence of such possible  
influence was been presented here. Regardless, the undersigned need not rely on this basis for upholding the ALJ's finding here,  
for, as discussed above, the ALJ already provided two valid reasons for discounting the testimony of plaintiff's son.

1 The undersigned does find, however, that the ALJ erred in not giving any reasons for not adopting  
2 the testimony of plaintiff's wife. At the hearing, plaintiff's wife testified as follows in regard to plaintiff:

3 Since he has trouble sleeping, he's not sleeping the whole night. And he an [sic] only  
4 fall asleep for about two hours in the morning. Then he wakes up and he's not able to  
5 do the full time job, since he did not sleep. But did not rest well. And since the surgery  
6 I have to take care of him because he's very weak.

7 Tr. 341. Defendant argues the ALJ did not err in failing to address this testimony, because an examining  
8 physician in the record whom the ALJ relied on in part to find plaintiff capable of performing light work,  
9 accounted for plaintiff's sleeping difficulties. See Tr. 22, 202-03. Thus, any error on the part of the ALJ  
10 here, plaintiff asserts, is harmless, as no reasonable ALJ considering such testimony would have reached a  
11 different disability determination. Stout v. Commissioner, Social Security Admin., 454 F.3d 1050, 1055  
12 (9th Cir. 2006) (error harmless where irrelevant to ALJ's ultimate disability conclusion). The undersigned,  
13 however, cannot say for sure that consideration of the testimony of plaintiff's wife would not have made  
14 any difference to the ultimate outcome of this matter, despite the apparent dearth of medical evidence in  
15 the record supporting the allegations that plaintiff is unable to work. Accordingly, remand to re-consider  
16 this evidence is appropriate here as well.

#### 17 IV. Step Five of the Sequential Disability Evaluation Process

18 If a claimant cannot perform his or her past relevant work, at step five of the disability evaluation  
19 process the ALJ must show there are a significant number of jobs in the national economy the claimant is  
20 able to do. Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20 C.F.R. § 404.1520(d), (e), §  
21 416.920(d), (e). The ALJ can do this through the testimony of a vocational expert or by reference to the  
22 Commissioner's Medical-Vocational Guidelines (the "Grids"). Tackett, 180 F.3d at 1100-1101; Osenbrock  
23 v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).

24 Plaintiff argues that he is a person of "advanced age" (i.e., age 55 or older), who has a limited, less  
25 than a high school, education because he attended school in Russia and is not fluent in English, whose past  
26 work has been unskilled work, and who is limited to less than sedentary work. Thus, by analogy, plaintiff  
27 asserts he meets the requirements for being found disabled under Grid Rule 201.04. Pursuant to Grid Rule  
28 201.04, a claimant is deemed disabled if he or she is of advanced age, has achieved a high school or  
greater education, has no past work or only past unskilled work, and who has a maximum sustained work

1 capacity to perform limited to sedentary work.<sup>4</sup> 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.4. As discussed  
2 above, however, the evidence in the record does not support a limitation to sedentary or less than sedentary  
3 work. Accordingly, the ALJ was not required to find plaintiff disabled under this Grid Rule.

4 V. This Matter Should Be Remanded for Further Administrative Proceedings

5 The Court may remand this case “either for additional evidence and findings or to award benefits.”  
6 Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ’s decision, “the proper course,  
7 except in rare circumstances, is to remand to the agency for additional investigation or explanation.”  
8 Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Thus, it is “the unusual case in  
9 which it is clear from the record that the claimant is unable to perform gainful employment in the national  
10 economy,” that “remand for an immediate award of benefits is appropriate.” Id.

11 Benefits may be awarded where “the record has been fully developed” and “further administrative  
12 proceedings would serve no useful purpose.” Smolen, 80 F.3d at 1292; Holohan v. Massanari, 246 F.3d  
13 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded where:

14 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the claimant’s]  
15 evidence, (2) there are no outstanding issues that must be resolved before a  
16 determination of disability can be made, and (3) it is clear from the record that the ALJ  
would be required to find the claimant disabled were such evidence credited.

17 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002). Because  
18 of the need for a new hearing with an interpreter to translate plaintiff’s testimony, and because issues still  
19 remain in regard to the testimony of plaintiff’s wife, this matter should be remanded to the Commissioner  
20 for further administrative proceedings. If, on remand, the testimony of plaintiff and his wife demonstrates  
21 that the ALJ’s assessment of plaintiff’s residual functional capacity was improper, the Commissioner shall  
22 re-determine whether plaintiff can return to his past relevant work at step four of the sequential disability  
23 evaluation process, and, if necessary, whether he is capable of performing other jobs existing in significant  
24 numbers in the national economy at step five.

25 CONCLUSION

26 Based on the foregoing discussion, the Court should find the ALJ improperly concluded plaintiff  
27 was not disabled, and should reverse the ALJ’s decision and remand this matter to the Commissioner for

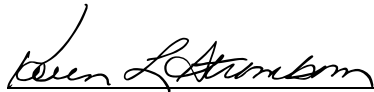
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28 <sup>4</sup>Likely, plaintiff meant to refer to Grid Rule 201.01, which reads the same as Grid Rule 201.4, but which requires only  
a limited or less education. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.01.

1 further administrative proceedings in accordance with the findings contained herein.

2 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 72(b),  
3 the parties shall have ten (10) days from service of this Report and Recommendation to file written  
4 objections thereto. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
5 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit  
6 imposed by Fed. R. Civ. P. 72(b), the clerk is directed set this matter for consideration on **August 22,**  
7 **2008**, as noted in the caption.

8 DATED this 24th day of July, 2008.

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11 Karen L. Strombom  
12 United States Magistrate Judge  
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